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The Diversity Feedback Loop

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INTRODUCTION

By most accounts, the pursuit of racial diversity in the modern elite US workplace is ubiquitous. While the extent to which firms genuinely care about achieving diversity may be debatable, that corporations routinely assert that diversity is good for business is not. The salience of this corporate refrain raises a specific question about law: Is there a tension between firms expressing an interest in pursuing diversity, on the one hand, and the space they have to do so, on the other, under current antidiscrimination law? Arguably, there is.[1] Given recent doctrinal developments,[2] it is uncertain whether Title VII permits race-conscious hiring measures that seek to reap the workplace benefits of racial diversity, especially if such measures do not fit the mold of traditional affirmative action

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[1] See, for example, New York City Bar Association Committee on Labor and Employment Law, *Employer Diversity Initiatives: Legal Considerations for Employers and Policymakers*, *1–3 (New York City Bar April 2012), online at http://www2.nycbar.org/pdf/report/uploads/20072272-EmploymentDiversityInitiatives.pdf (visited Oct 18, 2014) (describing the tension); John David Skrentny, *After Civil Rights: Racial Realism in the New American Workplace* ch 1 (Princeton 2014) (noting the tension between the practice of diversity and the formal dictates of Title VII). For a recent study of employer practices relating to workplace diversity, see Soohan Kim, Alexandra Kalev, and Frank Dobbin, *Progressive Corporations at Work: The Case of Diversity Programs*, 36 NYU Rev L & Soc Change 171, 205–06 (2012).

[2] See, for example, *Ricci v DeStefano*, 557 US 557, 563 (2009) (holding that Title VII does not permit race-conscious action to alleviate racial disparities in the workforce unless employer has "strong basis in evidence" that failure to take such action would result in liability for disparate impact).

plans designed to remedy "manifest imbalances" associated with past discrimination.[3]

There is little doubt that at some point in the near future, the Supreme Court will weigh in on this question.[4] In anticipation of that intervention, this Article seeks to understand the significance of workplace affirmative action from a broader, systemic perspective that scholars have largely overlooked. We step back from the question of whether employer affirmative action can be doctrinally and theoretically justified by appeal to the value of diversity and examine, instead, the role affirmative action plays in shaping workplace diversity. Significantly, our inquiry is not limited to workplace affirmative action plans: we focus our attention on university affirmative action plans as well. We do so to investigate the relationship between workplace diversity and what we hypothesize to be a critical determinant: the diversity of the colleges and universities that feed the employment market. We examine, in short, the causal relation between diversity in the workplace and diversity in the student bodies of higher educational institutions. We describe this often overlooked relationship to situate race-conscious hiring by employers in the context of other important systemic factors that contribute to the production of workplace diversity. Our hope is that the framework we employ will inform the debate about the legal permissibility of employer affirmative action that is sure to come.

For purposes of the discussion, we assume that it is an open question whether employers can invoke the value of diversity to justify their affirmative action policies.[5] We assume further that, as recently restated by the Supreme Court in *Fisher v*

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[3] See *Johnson v Transportation Agency*, 480 US 616, 631–40 (1987) (applying manifest imbalance test to justify gender-conscious employment decision); *United Steelworkers v Weber*, 443 US 193, 208–09 (1979) (holding that voluntary race-conscious hiring plan falls within Title VII's purpose of correcting a manifest imbalance). For a detailed argument that *Ricci* contravenes certain key aspects of *Johnson* and *Weber*, see Sachin S. Pandya, *Detecting the Stealth Erosion of Precedent: Affirmative Action After* Ricci, 31 Berkeley J Empl & Labor L 285, 299 (2010).

[4] See Roberto L. Corrada, Ricci's *Dicta: Signaling a New Standard for Affirmative Action Under Title VII?*, 46 Wake Forest L Rev 241, 241 (2011) (noting current uncertainty about the legal standards governing the permissibility of voluntary affirmative under Title VII).

[5] But see *Taxman v Board of Education*, 91 F3d 1547 (3d Cir 1996) (en banc) (rejecting the diversity rationale under Title VII), cert granted, 521 US 1117 (1997), cert dismissed, 522 US 1010 (1997).

University of Texas at Austin,[6] the value of diversity can justify a university's consideration of race as a factor in deciding which applicants to admit.[7] Given the accepted value of diversity in the constitutional setting[8] and the common goals of educational affirmative action and of Title VII (such as reducing discrimination and promoting racial integration),[9] many have argued that affirmative action is as normatively desirable and as necessary in the workplace context as it is in the university context. The thinking is that, because workplaces should be in equipoise with universities with respect to realizing the benefits of diversity, the normative justifications for diversity and the policy mechanism for implementing it—affirmative action—should be transplanted from the educational context to the employment context.[10]

Multiple scholars have endorsed some version of the "transplant" argument.[11] Some support their position by

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[6] 133 S Ct 2411 (2013).

[7] See id at 2420–21 (remanding for determination of whether university's consideration of race in admissions was narrowly tailored to achieve student body diversity).

[8] See id at 2421.

[9] See Cynthia L. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 Berkeley J Empl & Labor L 1, 38 (2005).

[10] See id at 23–26. Some scholars frame this argument in terms of the basic goals of antidiscrimination law, including Title VII—namely, to eliminate racial disparities and inequalities in the employment context. See id at 4. This entails increasing the number of racial minorities in workplaces where they are underrepresented—in other words, increasing racial diversity in those contexts. Affirmative action is a sensible way to do that. So, if the value of diversity justifies race-conscious action in the educational context, and if we agree that racial diversity also has positive value under Title VII, it would seem to follow that race-conscious action should also be justified in the employment context.

[11] See Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 Ohio St L J 1385, 1400–08 (2003) (exploring the correlation between the goals of Title VII and affirmative action); Katharine T. Bartlett, *Making Good on Good Intentions: the Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 Va L Rev 1893, 1947–56 (2009) (explaining that contact and exposure to minorities may help reduce implicit stereotypes and unconscious discrimination); Kenneth R. Davis, *Wheel of Fortune: A Critique of the "Manifest Imbalance" Requirement for Race-Conscious Affirmative Action Under Title VII*, 43 Ga L Rev 993, 1032–55 (2009) (describing how the goals of Title VII are enhanced by voluntary affirmative action without the manifest imbalance requirement); Tristin K. Green, *Race and Sex in Organizing Work: "Diversity," Discrimination, and Integration*, 59 Emory L J 585, 600–05 (2010) (showing that race or gender conscious work organizing decisions can foster an integrated work environment that will reduce biases and stereotyping); Jessica Bulman-Pozen, Note, Grutter *at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 Yale L J 1408, 1442–47 (2006) (explaining that workplaces, like schools, benefit most from integration rather than remediation); Katherine M. Planer, Comment, *The Death of Diversity? Affirmative*

analogizing the persistence of educational inequalities and the underrepresentation of students of color at colleges and universities to existing employment inequalities and the underrepresentation of people of color in the modern workplace. Others highlight the similarities between the remedial purposes of Title VII and those of the Equal Protection Clause. Still others invoke empirical evidence showing how the presence of diversity can reduce discriminatory bias and harmful stereotyping not only at colleges and universities but in the workplace as well.

We do not argue that the transplant approach is mistaken. The benefits of educational and workplace diversity may indeed be comparable. The problem is that scholars who justify affirmative action in the workplace by analogy to education overlook a crucial fact: the university and the workplace are not separate and distinct institutional settings in which diversity is or is not achieved. They are part of a causally connected system.[12]

This is no small thing. It means that the policies and practices surrounding diversity in each context shape and influence the diversity that emerges in the other. Scholars, policy makers, and judges have largely ignored this crucial dynamic. They continue to frame affirmative action practices in the workplace and those at colleges and universities as

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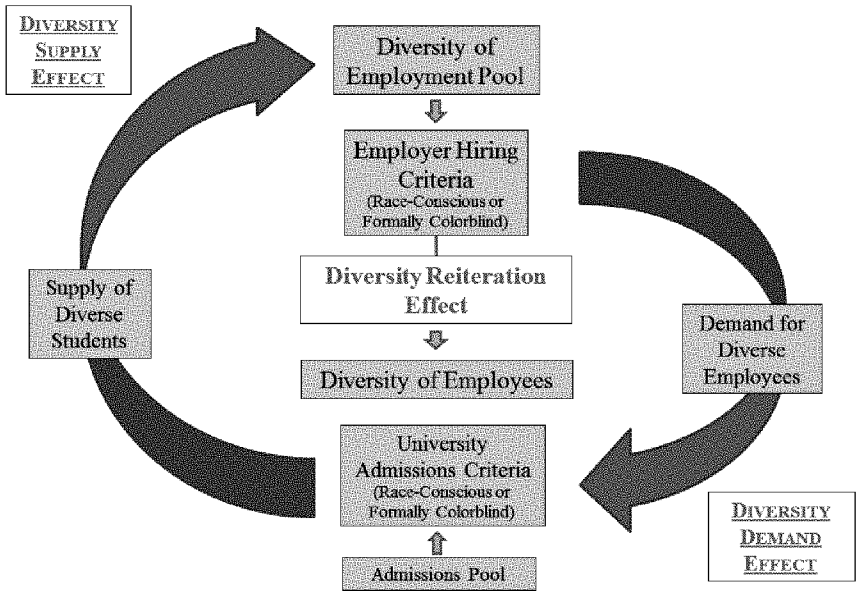
Action in the Workplace After Parents Involved, 39 Seton Hall L Rev 1333, 1354–57 (2009) (considering the viability of the diversity rationale for race-conscious employment decisions); Estlund, 26 Berkeley J Empl & Labor L at 23–26 (cited in note 9); Jared M. Mellott, Note, *The Diversity Rationale for Affirmative Action in Employment After* Grutter*: The Case for Containment*, 48 Wm & Mary L Rev 1091, 1103–04 (2006) (noting the Supreme Court has only accepted affirmative action programs that serve the same goals as Title VII and rejecting extension of diversity rationale for affirmative action beyond educational context); Anita Bernstein, *Diversity May Be Justified*, 64 Hastings L J 201, 218–24 (2012) (reviewing empirical studies concerning effect of diversity on social welfare and the workplace); Ronald Turner, Grutter*, the Diversity Justification, and Workplace Affirmative Action*, 43 Brandeis L J 199, 233–34 (2005) (expressing concern that along with its benefits, diversity justifications may extract opportunities from non-minorities); Corey A. Ciocchetti and John Holcomb, *The Frontier of Affirmative Action: Employment Preferences & Diversity in the Private Workplace*, 12 U Pa J Bus L 283, 314–24 (2010) (recognizing that contemporary employers implement affirmative action plans to foster a diverse workforce, rather than to remediate past wrongs); Jerry Kang and Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"* 94 Cal L Rev 1063, 1067–71 (2006) (surveying backward and forward looking justifications for affirmative action).

[12] Significantly, even when scholars point out potential difficulties with the transplant approach, they generally treat the educational and workplace settings as separate domains of diversity. The question these scholars then ask is whether diversity really has the same value or function in these two settings and whether it follows that these different diversity domains should be subject to the same legal constraints.

disaggregated diversity mechanisms. This limits our ability to understand fully what is at stake with respect to overruling *Grutter v Bollinger*[13] and/or prohibiting affirmative action in the workplace. In this respect, analyses of diversity-based affirmative action in the employment context or the educational context are incomplete unless they take into account the consequences that rules permitting or restricting such action in either domain are likely to have for the system as a whole. We examine these consequences by way of a model that we call the "diversity feedback loop."

Three central features constitute our model: a *supply effect*, a *reiteration effect*, and a *demand effect*. The schematic below and accompanying texts describe how these three dynamics combine to create the diversity feedback loop.

The Diversity Feedback Loop



The basic dynamics are these:

The university through its admissions policy assembles a diverse student body (or not) that upon graduation becomes a key supply of labor for potential employers—*a supply effect*.

To the extent that employers hire diverse students from the supply of graduates, the level of diversity that exists in that

[13] 539 US 306 (2003).

supply is reproduced or "reiterated" in the workplace—*a reiteration effect.*

The employer's diversity hiring criteria exert a demand for employees who have particular characteristics, which can influence the criteria that universities use to determine the students they admit—*a demand effect.*

The remainder of the paper elaborates on these dynamics to demonstrate that we stand a better chance of improving the diversity of universities and workplaces if we recognize that both domains are part of the same diversity system.[14] This insight is relevant not only as a normative matter (whether it makes sense to promote affirmative action in both the workplace and the university setting); it is also relevant as a doctrinal matter (whether the legality of affirmative action in the context of the workplace should be coextensive with the legality of affirmative action in the context of the university).

Our argument unfolds in four parts. Part I discusses the supply and reiteration effects. These effects follow from the fact that universities are a gateway to the workplace. Today's student bodies are tomorrow's potential workforces. To the extent that employers rely on universities as a source of labor, universities function as a pathway through which diversity is supplied. The diversity of the university provides both a limit on and a template for diversity in the workplace.

Yet, when employers hire from affirmative action institutions, their own diversity-enhancing selection measures (if any) might not mirror the measures implemented at the university admissions stage. Employers in their hiring might seek to realize a conception of diversity that differs in significant ways from the educationally-rooted ideal of a diverse student body. Consequently, actors in these two institutional settings might "screen" for diversity in distinctive ways. Part II explores the implications of the possible divergence between the employer and university diversity screens.

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[14] Justice O'Connor's argument that affirmative action helps establish a visible path to, and diversity at the level of, leadership is consonant with what we call the supply effect, see *Grutter*, 539 US at 332–33. See also William G. Bowen and Derek Bok, *The Shape of the River* 128–31 (Princeton 1998) (discussing reasons why attendance at a selective university might enhance career opportunities). Our account goes beyond this insight by modeling how the diversity pathway functions and by showing that this linkage is just one aspect of the system that connects university and workplace diversity.

Part III demonstrates how the hiring practices of employers can influence the admissions practices of universities. Universities operate within multiple competitive markets. Among other things, they are competing to place their students with the best employers. Students, in turn, likely evaluate schools at least in part based on their placement rates. Universities with poor placement records are at a competitive disadvantage relative to those with stronger ones. This creates an incentive for universities to supply the kind of diversity that employers want.[15] Doing so maximizes the likelihood that employers will hire the graduates of those universities. To the extent that universities structure their diversity initiatives to maximize the employment opportunities available to their graduates, the diversity preferences of employers exert a demand on the university's admissions regime. Part III discusses this demand effect.

I. THE SUPPLY AND REITERATION EFFECTS

A. The Basic Supply Hypothesis

The Supreme Court recognized long ago that the composition of the relevant labor market can constrain an employer's ability to eliminate patterns of racial exclusion from its workplace.[16] Of course, employers who engage in discrimination (or who practice affirmative action) can cause their workforces to be significantly less (or more) racially diverse than the available pool of qualified labor. But the fact remains that the makeup of that pool places certain limits on the composition of the employer's workplace. For example, if there are no Asian Americans in the labor pool, there will be no Asian Americans in the workplace, no matter what hiring policies

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[15] While more and more companies hire workers from overseas, typically these hires do not stand in for the diversity of US-born or identified racial minorities.

[16] See *Hazelwood School District v United States*, 433 US 299, 308 (1977) (acknowledging that the proper comparison is between the racial composition of the school district's teaching staff and the qualified public school teacher population in the relevant labor market); *International Brotherhood of Teamsters v United States*, 431 US 324, 339 n 20 (1977) ("[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will, in time, result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.").

employers use. Employers cannot create workplace diversity out of thin air. They need a supply.

The importance of educational diversity as a source of workplace diversity was emphasized in an amicus brief filed by Fortune 100 Companies in the *Fisher* case. We quote directly from the brief:

> But amici [Fortune 100 Companies] cannot reach [the] goal [of a diverse workforce] on their own. . . . When amici make decisions about hiring and promotion, it is critical that they be able to draw from a superior pool of candidates—both minority and non-minority—who have realized the many benefits of diversity in higher education. There can be no question that "[t]he Nation's future" does indeed continue to "depend[ ] upon leaders"—including business leaders—"trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."[17]

The fact that employers rely on institutions of higher education to provide a supply of diverse labor implies that the achievement of racial diversity in the workplace will depend not only on the behavior of employers, but also on the behavior of educational institutions. Thus, workplace diversity is potentially affected by the use of affirmative action by universities at the admissions stage as well as by employers at the hiring stage.[18] If this is so, understanding the conditions necessary for achieving

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[17] Brief for Amici Curiae Fortune-100 and Other Leading American Businesses in Support of Respondents, *Fisher v University of Texas*, Civil Action No 11–345, *13 (US filed Aug 13, 2012) (emphasis omitted), quoting *Regents of the University of California v Bakke*, 438 US 265, 313 (1977) (Powell) (quotation marks omitted). See also Sung Hui Kim, *The Diversity Double Standard*, 89 NC L Rev 945, 948 (2011) (noting with reference to the corporate briefs in *Grutter v Bollinger* litigation that they advanced the argument that "diversity is good [for business] because it produces good inputs"). For other discussions of how diversity figured into the amicus briefs filed by corporations during the *Grutter* litigation, see Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 Wis L Rev 795, 796–97, 820–37 (2005); David B. Wilkins, *From "Separate is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 Harv L Rev 1548, 1551, 1553–55, 1557–59, 1576–78, 1583, 1586–87 (2004).

[18] Bowen and Bok argue that affirmative action facilitates "the flow of talent—particularly talented black men and women—through the country's system of higher education and into the marketplace and larger society." Bowen and Bok, *The Shape of the River* at xxi (cited in note 14) (highlighting that affirmative action creates a pipeline of employees to the workplace).

workplace diversity requires isolating the expected effects of race-conscious selection measures at each stage. One way to do so is to explore how, if at all, the diversity of the workplace is affected by (1) the use of affirmative action in education; and (2) the use of affirmative action by employers. This Article provides a theoretical model for investigating these questions. Before elaborating on this model, an important specification is in order.

Although we believe that the model we describe below applies to employers who hire from highly selective colleges and universities generally, for simplicity, we narrow our focus to law firms who hire their associates predominantly from highly selective law schools. We will refer to the law firms that hire in this way as "elite law firms" and the selective law schools from which they hire as "elite law schools." Of course, elite law firms hire from non-elite law schools, and non-elite firms hire from elite law schools as well. That we have simplified our model in this way should not obscure that (1) most of the literature on racial diversity and law firms focuses on elite law firms, (2) elite law firms are more likely to hire from elite law schools than non-elite law schools, and (3) there is reason to believe that elite law firms will hire very few people of color from non-elite law schools.[19] In this respect, our simplified model nevertheless

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[19] Although elite law firms may do some limited hiring from non-elite law schools, for the most part, that hiring will not include black or Latino students. One explanation for this behavior may be that, for a variety of reasons that are beyond the scope of this essay, blacks and Latinos tend to receive lower grades in law school than their white and Asian American counterparts. For a statistical examination of law school performance gaps, see Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 L & Soc Inquiry 711, 725 (2004). Because elite law firm hiring from non-elite law schools tends to be limited to the very top of the graduating class, blacks and Latinos in non-elite firms might look proportionally underrepresented in the elite firm workplace were we to define the hiring pool to include non-elite firms. Such a definition might make our analysis more empirically grounded, but it would make it difficult for us to model the expected effects of racial diversity in the hiring pool alone, not confounded by the effects of employer selection for variables unrelated to race. By limiting the definition of the hiring pool to elite law schools, we can factor out this confounding variable. While elite law firms may care about the grades of black and Latino students at elite law schools, their focus tends to be on whether these—and other—elite law school students have met some threshold level of achievement, not on whether they are at the top of their class. The more "elite" the law school, the less significant the grades (again, above some threshold of academic performance). See Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?*, NYSBA J 20, 26 (Oct 2010) (noting this trend while challenging the current economics of legal education and employment). Consequently, even if blacks and Latinos at elite law firms receive lower grades than their white and Asian American

allows us both to track a real dynamic—the flow of diversity from elite law schools to elite law firms—and describe our theoretical hypothesis: namely, that the diversity of elite law school student bodies is a causal determinant of the diversity of elite law firm workplaces. It bears emphasizing that whatever diversity exists in elite law firms has to come from somewhere, and we have stipulated that elite law firms hire only from elite law schools.

The question then becomes: What affects the diversity of elite law schools? One answer is the school's admissions policy. The diversity of an elite law school student body is at least partly determined by that law school's positive consideration of race as a factor in admissions, that is, its affirmative action policy. The more robust the elite law school's race-conscious affirmative action program, the more diverse its student body will be; and the more diverse a law school's student body, the more diverse its graduates. Since elite law firms, by our definition, hire from the labor pool formed by these graduates, it follows that the use of affirmative action by elite law schools is causally linked to the racial composition, and hence the diversity, of the workplace of these employers.[20]

To summarize, a law school's admissions regime affects the diversity of the student body; the diversity of the student body shapes the diversity of the labor pool; and the diversity of the labor pool impacts the diversity of law firms. These observations together make up what we call the supply effect in the university-workplace relation. With this preliminary hypothesis in place, we now model how a legal rule permitting or restricting race-conscious hiring might modulate the movement of diversity from law school student bodies to the workplace of the law firm.

B. The Reiteration Effect: Default Case

We begin by establishing what we call a reiteration effect, or the basic tendency of the level of diversity that exists in the labor supply pool to be reproduced in the relevant workplace. As

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counterparts, they are not outside of the elite law firm's hiring pool. Thus, by limiting our definition of the relevant hiring pool to elite law school students, we can factor out the confounding variable of class rank with a simple (albeit still idealizing) stipulation: law firms are generally indifferent to grades in their hiring of elite law school graduates.

[20] Of course, there are other factors at play. We do not claim that law school affirmative action is the sole determinant of elite law firm diversity. It suffices for our purposes that it is one significant factor.

a predicate, we make three additional assumptions.[21] First, for reasons previously discussed,[22] we assume that, above some threshold of satisfactory academic performance, elite law firms are indifferent to grades.[23] We further assume that the diversity of the group of students who achieve this level of academic performance is the same as the diversity of the student body overall.[24] These assumptions imply that most graduates of elite law schools, including black and Latino students, are regarded by elite law firms as equally qualified to be hired as associates.[25] Third, we stipulate that the graduates of all elite law schools who are interested in working in an elite law firm are equally willing to accept positions in all elite firms,[26] but that any given firm can lure any particular graduate by expending more resources on recruiting or by offering incentives, such as stronger commitments about the kind of work incoming associates will perform. Fourth, we assume that the law firm's and the law school's conceptions of diversity are congruent

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[21] Many readers may balk at some of our more aggressive assumptions. Concededly, some of our assumptions may be more stipulative than veridical. But keep in mind that we are trying to isolate the intuitive operation of a small handful of variables. In order to do this, we need to assume away a large number of complications. We do not deny that these complications exist in the real world. The point, however, is that they are indeed complications, and we think there is much insight to be gained in trying to think about what would happen in their absence.

[22] See note 19.

[23] For completeness, let us stipulate also that elite law firms generally do not hire students who fall below that threshold.

[24] We stipulate only that the diversity of the set of elite graduates deemed "hirable" by elite firms matches the diversity of the class as a whole and that firms do not distinguish among hirable graduates in terms of grades; we need not assume an absence of race-correlated grade disparity within the hirable group.

[25] As discussed above, the purpose of this concededly aggressive stipulation is to enable us to theorize how workplace diversity might be affected by the overall level of racial diversity in law school student bodies and positive consideration of race (for the sake of creating diversity) by law firms and law schools. Our stipulations are intended to isolate these variables by assuming away complicating factors that might mask the basic dynamics.

[26] In reality, of course, law students may prefer certain firms over others based on a variety of factors, such as location, practice area strengths, firm culture, diversity, prestige, and reputation. Nevertheless, our assumption of law student indifference, like our other assumptions, are designed to establish a workable baseline scenario that allows us to explore the dynamic interaction of a few key variables. Introducing complications such as law student preferences for particular law firms would likely obscure the specific interactions that we wish to highlight. That said, our idealized baseline scenario is just that—a baseline. Though beyond the scope of this paper, further analysis could involve loosening one or more of our idealizing assumptions to explore how outcomes might be expected to change.

(including judgments about whether a particular individual will contribute to diversity).[27]

With these assumptions out of the way, it is helpful to invoke a general axiom famously endorsed by the Supreme Court, albeit in the context of a rather different issue. According to the Court, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will, in time, result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."[28] This general axiom, as applied to our model, suggests that in the absence of employer discrimination,[29] the level of workplace diversity among elite law firms will, over time, be the same as the level of diversity that exists in the student bodies of law schools. Whatever diversity exists in elite student bodies will be randomly supplied to all firms, with no single law firm having a higher or lower level of diversity than others, except by operation of chance.[30]

The assumed absence of discrimination might strike some readers as overly simplistic, contradicted by empirical evidence about ongoing employment discrimination. Any model that assumes that away, the argument might be, assumes away too much. Two responses are in order. First, if we do not assume away discrimination, that variable becomes something of a showstopper for our desired analysis. If employers are assumed to discriminate, then of course workplace diversity will be almost entirely a function of their exclusionary policies—full stop. Thus, we might learn more about the structural relation between educational and workplace diversity if we think about what we would expect to happen in the absence of discrimination.

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[27] We relax this assumption in Part II below.

[28] *Teamsters*, 431 US at 339 n 20. The Court was addressing whether intentional discrimination could be proved through the use of statistical evidence of disparities between the racial composition of the employer's workforce and the local labor market.

[29] Here we use "discrimination" to refer to actions—implicitly or explicitly motivated—based on bias, prejudice, or preferences that operate to the disadvantage of racial minorities. We do not count the use of pro-diversity racial preferences as discrimination. We recognize that this may be a contested usage in the legal context of Title VII interpretation.

[30] We might add that any observed statistically-significant disparities in levels of diversity between firms could presumptively be attributed to discrimination (either intentional or not) or to positive employer preferences for diversity.

Second, and perhaps more importantly, imagining what we would expect to happen in the absence of discrimination is an important exercise because it puts us in a position to test doctrinal developments on the Supreme Court over the past two decades that restrict the ability of plaintiffs to bring discrimination claims.[31] While it would be putting the point too strongly to say that the Court's jurisprudential default with respect to employment discrimination is to say that it does not exist, it is fair to say that the federal courts have not been sympathetic to such claims.[32] This is why white plaintiffs have had an easier time bringing "reverse discrimination" claims than people of color have had bringing discrimination claims.[33] Our sense is that at least some members of the Supreme Court would endorse the view that diversity initiatives in the workplace are not necessary as a corrective for something that is largely no longer a problem: employment discrimination.[34] The thinking would be that if there is a qualified, diverse pool of

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[31] See, for examples of recent Court decisions restricting plaintiffs' ability to bring discrimination claims, *University of Texas Southwestern Medical Center v Nassar*, 133 S Ct 2517, 2534 (2013) (holding that a plaintiff must show that protected activity, such as complaining about employment discrimination, was a but-for cause of the alleged adverse employment action); *Vance v Ball State University*, 133 S Ct 2434, 2439 (raising the standard for who qualifies as a supervisor, making it more difficult for plaintiffs to allege and prevail on employer liability).

[32] See Kevin M. Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv L & Pol Rev 103, 115 (2009) (arguing that empirical data on low success rates for employment discrimination plaintiffs "raises the specter that federal appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employees' victories below while gazing benignly at employers' victories"). See also Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 SLU L J 111, 159–62 (2011) (summarizing recent scholarship discussing judicial hostility toward employment discrimination claims).

[33] See, for example, *Fisher*, 133 S Ct at 2421 (reasserting the standard of strict scrutiny that university affirmative action policies must comply with, on a case brought by a white plaintiff alleging reverse discrimination); *Ricci*, 557 US at 593 (ordering entry of summary judgment for white plaintiffs who brought discrimination claim against fire department that sought to avoid disparate impact liability by discarding results of exams required for promotion); Cheryl I. Harris and Kimberly West-Faulcon, *Reading* Ricci: *Whitening Discrimination, Racing Test Fairness*, 58 UCLA L Rev 73, 103 (2010) (discussing the ways in which antidiscrimination law has developed to privilege white plaintiffs).

[34] See Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions* *4 (George Washington Law School Public Law Reasearch Paper No 2014–8), online at http://ssrn.com/s013/papers.cfm?abstract_id=2430378 (visited Oct 18, 2014) (arguing that the Supreme Court no longer sees discrimination as a "default explanation" for disparities in workforce composition and tends to be "entirely dismissive of the notion that there is any need for remedial action" to correct for the effects of past discrimination).

people of color, firms will hire them. Note how this view aligns with the assumptions of our model—namely, the elite law school's student body diversity will be supplied fully and uniformly into the workplace.

In any event, our claim is that in a world in which our basic assumptions hold true, the racial diversity that exists in the graduating student bodies of elite law schools will be uniformly distributed among all elite law firms, such that the level of diversity in the group of students who enter the elite workplace matches the level of diversity in the elite law student pool overall. In other words, in the default conditions of our model, workplace diversity simply reiterates student body diversity.

C. Modeling the Reiteration Effect Under Four Alternative Conditions

If full and uniform reiteration is expected in our model's default conditions, what might we expect to observe if we vary both the law firm's and the law school's behavior? That is the question we now take up. We will examine how the supply of diversity from the law school to the law firm might vary under four specific conditions. Condition I assumes that the level of law school diversity is high and that the law firm is prohibited from using affirmative action. Condition II imagines a low level of law school diversity; here, too, the law firm may not use affirmative action. Condition III permits the law firm to use affirmative action and posits a high level of law school diversity. Under Condition IV, the law firm is also permitted to use affirmative action but the level of law school diversity is low. We discuss below how each of these conditions might affect the supply of student body diversity from the university (the law school) to the workplace (the law firm).

1. Condition I: high educational diversity, employer affirmative action prohibited.

Suppose that there is a high level of racial diversity in the student bodies of elite law schools, such that the presence of racial minorities in these student bodies is as high as or higher than in the general population. (We might imagine a world in which all elite law schools were permitted under applicable state and federal law to consider the race of their applicants as a positive factor in the admissions process, and all elite law

schools did in fact do so). Stipulate also that law firms are *not* legally permitted to take race into account in their hiring decisions, in other words, that the law requires formally colorblind hiring. What result should be expected, given the assumptions of our model, for law firm diversity?

Assuming full compliance by law firms, we should expect that, over time, all elite law firms would come to have the same high level of diversity that is present in elite law school student bodies. That is to say, the diversity of the student bodies will be fully and uniformly supplied to the workplace. To understand why, recall that we are assuming for purposes of analysis that there is no explicit or implicit discrimination in the labor market. Insofar as firms are not going to differentiate among elite students (per our earlier hypothesis and explanation), we should expect student body diversity to be supplied to—and be randomly distributed among—all elite law firms. We would also expect that, over time, every elite law firm would mirror the demographic of the elite law school student bodies from which they are populated. In short, under Condition I, workplace diversity would be established at levels matching the diversity of the student pool even without the utilization of employer affirmative action.

2. Condition II: low educational diversity, employer affirmative action prohibited.

In this condition, suppose that elite universities have low levels of racial diversity, such that the proportion of racial minorities in their student bodies is significantly lower than their proportion in the general population. This scenario could emerge in a jurisdiction (like California) that prohibits the consideration of race in university admissions; the scenario could also occur if, at some future point, the Supreme Court overruled *Grutter* and held that affirmative action was unconstitutional in the educational context. Assume, as in Condition I, that the law prohibits race-conscious affirmative action hiring. What result?

As in Condition I, we should expect that, under Condition II, over time, all elite workplaces will come to share the demographics of the student bodies from which they draw. That is, all law firms will come to have an equally low level of racial diversity. A formally colorblind hiring rule, again assuming

non-discrimination, should reproduce the level of diversity present in the elite student body pool at the workplace level of the law firm. If the level of diversity in the overall pool of job candidates is low, then colorblind hiring should produce an equally low level of workplace diversity, uniformly distributed among firms.

3. Condition III: high educational diversity, employer affirmative action permitted.

In the third condition, stipulate that there is a high level of diversity in elite law school student bodies, as in Condition I. But now suppose that employers are *permitted* (but not required) to consider job applicants' membership in a minority racial group as a positive factor in their hiring decisions, if doing so is reasonably necessary to create or maintain diversity in the workplace.[35] What outcomes should we expect? The short answer: roughly the same level and distribution of workplace diversity as in Condition I, the condition with high diversity in the labor market and no affirmative action.

This might seem counterintuitive. One might think a rule permitting consideration of race for diversity purposes would lead to variances among law firms in their levels of diversity. But remember that firms are only permitted to employ affirmative action "if reasonably necessary" to ensure diversity. Since we stipulate in Condition III that there is a high level of diversity in the pool of available candidates, and given our overall assumption that this labor market is free of explicit or implicit forms of discrimination and biases, employers should not need to take race into account to yield meaningful diversity. A sufficiently high level of diversity in the pool of available candidates should, under formally colorblind hiring, be adequate to supply that same level of diversity uniformly across all law firms. Assuming that employers are aware of the racial demographics of the pool, it is reasonable to conclude that they would see little need to engage in affirmative action hiring and

[35] The qualification in our hypothetical rule permitting consideration of race only if "reasonably necessary" is not based on current Title VII law; but if the Supreme Court were to recognize a diversity-based justification for affirmative action in hiring, the Court would surely impose some limitation of this sort, if not an even more restrictive one.

would refrain from doing so.[36] Combining the results from Conditions I and III, we can conclude that in conditions of high diversity in the available pool of job candidates, we should not expect overall levels or the distribution of workplace diversity across law firms to be significantly dependent on whether or not employers are permitted to take race into account as a positive hiring factor for the sake of diversity.

4. Condition IV: low educational diversity, employer affirmative action permitted.

Our final condition assumes that there is a low level of racial diversity in the student bodies of elite law schools. Recall that this is also the case in Condition II. Stipulate now that, as in Condition III, law firms are permitted (but not required) to consider job applicants' race as a positive factor in their hiring decisions. The caveat, again, is that they may do so only if reasonably necessary to create or maintain diversity in the workplace. Under this condition, what should we expect vis-à-vis the overall supply and distribution of diversity in the workplace?

The results will depend on the extent to which law firms give positive weight to race in their hiring decisions. If law firms behave uniformly, then the results of Condition IV should be the same as Condition II (the condition with low education diversity, employer affirmative action prohibited). There are two ways in which employers could act uniformly.

First, all law firms might refrain from using affirmative action. This would render Condition IV indistinguishable from Condition II, so the same results should follow. Second, all law firms could decide to practice affirmative action. Under the default assumptions of our model, elite law firms are all on equal footing in terms of the likely success of their diversity initiatives. Thus, a university's student body diversity would be

[36] In Condition III, if an elite firm mistakenly believes that consideration of race is necessary for workplace diversity, the firm will end up with a level of diversity that is either equal to or higher than the level of diversity in the pool of available students. If the firm's pro-diversity hiring results in a level of diversity that is equal to that in the pool, then the firm's "unnecessary" consideration of race should have no effect on the overall distribution of diversity among firms. If the firm, as a result of its positive consideration of race, produces a higher level of diversity in its own workplace than is present in the overall applicant pool, this might tend to cause an increased level of diversity relative to the firms that perceive (correctly, according to our assumptions) that consideration of race is not necessary.

supplied uniformly to all elite workplaces. The overall level of resultant law firm diversity will also likely be uniform.[37]

But now let us imagine that elite firms have different views regarding the importance of establishing diversity in their workplaces. Assume that some firms give high priority to having a diverse workforce, while other firms care less about diversity as such, or are committed to an ideal of formally colorblind hiring. Suppose, in other words, that only some elite firms consider race as a positive consideration (call these "pro-diversity" firms) while other firms do not take race into consideration at all (call these "colorblind firms"). Under these additional assumptions, what result should we expect for workplace diversity among elite firms?

In our model, the amount of diversity in the elite law school student body pool limits the diversity that can be reiterated into the workplace, so we should expect the overall level of diversity among all elite firms to be about as low as that observed in the candidate pool. But unlike in previous conditions, we would expect the distribution of that diversity to be non-uniform across firms. Pro-diversity firms, insofar as they see a greater value in establishing workforce diversity, will offer higher salaries or expend more recruiting resources to lure job candidates who would enhance or bolster the firm's diversity profile. Colorblind firms, who by definition care less about diversity or are ideologically committed to colorblindness, would have no reason to make the extra expenditures necessary to attract the diverse candidates away from pro-diversity firms and so would be less likely to attract and hire them. Over time, therefore, pro-diversity firms will come to have a higher level of workplace diversity than colorblind firms. As student body diversity

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[37] One might think that the answer would depend on the ratio of elite students in the available labor pool to available positions. If there are at least as many employment positions available as there are elite students looking for jobs, then the uniform application of affirmative action preferences by employers should not disrupt the full and uniform propagation of the low level of diversity that exists in the elite student pool to the workplace. However, if there are fewer employment positions available than elite students in the pool, affirmative action will cause minority workers to be hired at a greater rate than non-minority workers, which will result in a level of workplace diversity that is higher than the level of diversity in the candidate pool. In this case, the argument might go, the diversity would not only propagate to the workplace, but would also be amplified. While this seems theoretically possible, it seems equally possible that in conditions of job scarcity, employers would either consciously or unconsciously scale back their affirmative action hiring upon reaching a certain "saturation" point for workplace diversity. If so, then there would be no amplification effect.

continues to cluster in pro-diversity firms from year to year, pro-diversity firms will eventually achieve a level of diversity that is higher than the level of diversity available in the elite student body pool, and colorblind firms will eventually have a level of diversity that is even lower than the already-low level available in the candidate pool.

It may not seem particularly remarkable that in Condition IV pro-diversity firms will come to achieve more workplace diversity than colorblind firms, but there are two less obvious points that bear mentioning. First, Condition IV is the only one of the four conditions in which we would expect anything other than a uniform distribution of diversity across all hiring firms. In all other conditions, including Condition III, in which we stipulated that employers are permitted to engage in pro-diversity hiring, we would expect the diversity of the workplace to be the same as the diversity of the relevant labor pool. Second, a comparison of Conditions II and IV shows that where the diversity of the available candidate pool is very low, an employment rule that permits but does not require pro-diversity hiring may result in a lumpy distribution of diversity among hiring firms. As a result, some firms might come to have high levels of diversity, while other firms would have minimal or no diversity. In contrast, an employment rule that requires colorblind hiring in conditions of low labor market diversity will tend to produce an even, albeit low, level of diversity among all hiring firms.

D. Summary

The table below summarizes the results of the preceding four conditions.

<table>
<tr><th>CONDITION</th><th>LEVEL OF EDUCATIONAL DIVERSITY</th><th>IS AFFIRMATIVE ACTION PERMITTED?</th><th colspan="2">LEVEL OF EMPLOYMENT DIVERSITY</th><th>IS DIVERSITY SPREAD UNIFORMLY ACROSS EMPLOYER?</th></tr>
<tr><td>I</td><td>High</td><td>No</td><td colspan="2">High</td><td>Yes</td></tr>
<tr><td>II</td><td>Low</td><td>No</td><td colspan="2">Low</td><td>Yes</td></tr>
<tr><td>III</td><td>High</td><td>Yes</td><td colspan="2">High</td><td>Yes</td></tr>
<tr><td rowspan="3">IV</td><td rowspan="3">Low</td><td rowspan="3">Yes</td><td colspan="2">Depends on uniformity among employers:</td><td rowspan="3">Yes (if employers act uniformly)
No (if employers act non-uniformly)</td></tr>
<tr><td>Non-uniformity among employers</td><td>Uniformity among employers</td></tr>
<tr><td>High (pro-diversity firm)
Low (Colorblind firm)</td><td>Low</td></tr>
</table>

The following five conclusions flow from these results. First, even when one takes into account the diversity practices of firms—that is, whether they engage in or refrain from using affirmative action hiring—the diversity of law school student bodies (the diversity supply) remains crucial to the analysis. Second, a similar point can be made with respect to law: whatever the governing legal regime with respect to whether employers are permitted to use affirmative action, the diversity of university student bodies will play an important role in shaping the diversity of the workplace. These two points highlight the importance of affirmative action in the educational domain. It is a significant mechanism through which diversity is supplied to the labor market.

This brings us to our third point: there are only two ways in our model to achieve high diversity in all elite workplaces. One is to ensure high diversity in elite student bodies. The other is to

induce all law firms to engage in affirmative action in conditions of job scarcity (creating an amplification effect).

Fourth, recall that Condition I—high educational diversity/affirmative action prohibited—produces a high level of diversity that is uniformly distributed across firms. This result argues in favor of jettisoning employment affirmative action if we have robust educational affirmative action. The latter will necessarily be supplied to the former. That is indeed the story our theoretical model tells. But a limitation of our model is that we assume away discrimination in the marketplace. If we add discrimination back into the model—and not necessarily intentional, invidious discrimination but simply unconscious, implicit bias—the results under Condition I would change. Firms whose decision-making reflects implicit bias would have a lower level of diversity than firms whose decision-making does not reflect this bias. For many proponents of affirmative action, this is precisely what affirmative action is designed to counteract—biases (implicit and explicit) in the labor market.

Fifth, understanding the foregoing limitation of our model is especially important in light of the Supreme Court's commitment to colorblindness and general judicial skepticism about workplace discrimination.[38] This is a point we made earlier but bears emphasizing here. Condition I is, for us, decidedly theoretical. However, for the conservative justices on the Court, Condition I might well be an assumed reality. That has implications for the future of affirmative action in the context of the workplace. If a majority of the Supreme Court concludes that workplace discrimination is a thing of the past, it could conclude that, even if affirmative action is necessary in the context of university admissions to achieve student body diversity, it is unnecessary in the context of the workplace, because the diversity of the student body would be reiterated into the workplace.

Our sixth and final conclusion is this: in low educational diversity conditions, rules that permit pro-diversity hiring will likely result in racial clustering, and law firms will separate themselves over time into high-diversity and low-diversity workplaces.[39] This has implications for jurisdictions like

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[38] See Stone, 56 SLU L J at 159–62 (cited in note 32).

[39] We say this is likely in our model, not certain, because clustering would not occur if all employers act in perfect unison with respect to their permitted use of pro-diversity

California that prohibit state universities from engaging in affirmative action. Some employees might find themselves in law firms in which there is meaningful diversity, but most will not. Still, to the extent that having meaningful diversity in some workplaces (Condition IV) is better than having low diversity across all workplaces (Condition II), we should ensure that the prohibition of affirmative action in the context of education is not extended to the context of employment.

II. DIVERGENT DIVERSITY SCREENS: COMPLICATING THE REITERATION DYNAMIC

In modeling the supply of diversity from elite law schools to elite law firms in Part I, we assumed that law firms and law schools share a common notion of "diversity." This need not be the case. A law firm might employ very different criteria than law schools. Law schools are admitting students to service multiple markets, including the public interest markets. Moreover, law schools want students who will facilitate the robust exchange of ideas. This includes students who have evidenced leadership in identity-specific organization as well of those who have engaged in student organizational efforts around diversity. The very rationale for affirmative action is predicated on admitted students who will advance these institutional interests.[40]

It is hard to imagine very many law firms seeking out applicants who are likely to be what we might call institutional activists (analogous to the student activist in the law school context). Law firms may want very different kinds of diversity. Their corporate market context will presumably shape the kind of—and how much—diversity they pursue. For example, while law firms are prohibited from invoking customer preferences to justify screening their application pool for racially palatable African Americans, presumably at least some firms end up (at least implicitly) doing just that.

To recognize that law schools and law firms do not necessarily employ the same diversity screens is not to say that their diversity initiatives must be regarded as autonomous.

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preferences.

[40] See Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L Rev 1130, 1148 (2013) (discussing how universities can screen for different types of diversity).

Indeed, we claim the opposite. For one thing, law firms and law schools might actually employ precisely the same diversity criteria (for example, looking for people who will facilitate racial cooperation and understanding), in which case we might say that their screens expressly converge. For another, even when law firm and law school diversity criteria do not expressly converge in this way, the diversity that actually arises in each context could nevertheless appear to converge on a shared conception.

Suppose, for example, that law firms care more than law schools about weeding out individuals with poor teamwork attributes. One might assume that this might cause law firm diversity to diverge from law school diversity. That is possible. But on the other hand, law firms might find that the experience of a diverse elite law school prepares students of all backgrounds to work productively and harmoniously in heterogeneous social settings. If this were true, even law firms that prioritize teamwork might be happy to accept, without much further screening, whatever type of diversity law schools produce. The general point is that if law firms perceive value in the diversity produced by law schools, they might seek to capitalize on that value by reproducing it in their workplaces.

Finally, law school and law firm diversity initiatives are not autonomous in another way: any diversity criteria the law firm utilizes at the hiring stage will necessarily piggyback on the diversity efforts of the law school at the admissions stage. As argued above, the diversity of law schools creates the diversity of the labor pool from which law firms hire.[41]

While keeping in mind these ways in which law school and law firm diversity initiatives are connected, we turn our focus in this Part to how law school and law firm initiatives can diverge. To appreciate how law firm and law school diversity screening can diverge and the implications of that divergence for the reiteration effect, let us call the set of minority individuals who are the beneficiaries of affirmative action at the law school admissions stage "Law School Diverse" or "LS-Diverse"

[41] The diversity of law schools is, in turn, determined in part by the diversity of the undergraduate institutions that supply their applicant pools. For purposes of our analysis, we have been taking the diversity of the law school applicant pool as given, but one might well hypothesize the existence of supply, reiteration, and demand effects in the interactions between law schools and undergraduate colleges.

individuals. And let us call the set of minority individuals who are beneficiaries at the law firm hiring stage "Law Firm Diverse" or "LF-Diverse" individuals. Some minorities might be both LS-Diverse and LF-Diverse, while others might be neither.

Consider the ways in which the set of LS-Diverse individuals might relate to LF-Diverse individuals: Quantitatively, the LF-Diverse group could be larger than, smaller than, or the same size as the LS-Diverse group. Qualitatively, the LF-Diverse group could overlap the LS-Diverse group in whole, in part, or not at all. These various possibilities could be combined in a large number of ways. We will not attempt to march through all of the permutations, but a few comments are in order.

There are various reasons why the set of people who are the beneficiaries of LF-Diversity initiatives might be different from those who previously benefitted from LS-Diversity initiatives. The two sets might be quantitatively different simply because universities and employers give different weight to racial considerations in the selection process. A heavier weighting will naturally tend to result in a larger set of individuals who benefit from the diversity initiative.

There might also be systemic reasons that could explain quantitative divergence between LS-Diversity and LF-Diversity. For example, if law schools engage in robust affirmative action measures and succeed in creating highly diverse student bodies, who then form the labor pool from which law firms hire, law firms might perceive that there is less of a need for them to use pro-diversity affirmative action in order to achieve significant workplace diversity. They may assume, per our discussion in Part I, that the diversity in the labor market will naturally "trickle up" or be reiterated into the firm. This might be especially true of firms that conceive of themselves as non-discriminatory. These firms would see little need to employ affirmative action as a prophylactic against the possibility of discrimination. Under this scenario, the set of people who benefit from LF-Diversity efforts may be low relative to the set of people who benefit from LS-Diversity efforts.

In short, aggressive and successful use of affirmative action at the law school level could create an incentive for some law firms to decrease the use of affirmative action at the employment level. When this occurs, quantitatively speaking, LS-Diversity initiatives and LF-Diversity initiatives will be

inversely correlated. This suggests that it is important that law firms are made aware of the subtle but significant ways in which race can affect their decision-making even when they are committed to nondiscrimination. That awareness will make them less inclined to jettison their affirmative action policies on the view that the diversity of the labor pool will necessarily be reiterated into the workplace.

Law firm and law school affirmative action initiatives might also yield different sets of beneficiaries for reasons having to do with the context dependent nature of diversity initiatives. LF-Diversity might be qualitatively different from LS-Diversity. Employers and universities might look for different characteristics in constructing their institutional diversities. Employers might, for example, screen candidates for compatibility with their corporate culture in ways that constrain their pro-diversity hiring.[42] In some cases, what might appear to be facially-neutral screening criteria might cause LF-Diversity selections to be negatively correlated with LS-Diversity selections. A silly example: a law firm might screen in favor of minority candidates who, in addition to attending elite law schools, attended prestigious private prep schools. But minority law students with prep school backgrounds might be less likely than others to have benefited from affirmative action at the law school admissions stage—that is, less likely to be LS-Diverse. If so, then law firm screening for minorities who attended prestigious private prep schools could cause LF-Diversity to be negatively correlated with LS-Diversity.

Law firm diversity and law school diversity might diverge in other ways. Elite law firms and elite law schools might have different ideas about the characteristics (in addition to simple racial phenotype) that could make one person preferable to another from the standpoint of enhancing the institution's diversity. The basic educational goals and academic principles that define the mission of elite universities (of which elite law schools are a part) do not apply to most elite employers.[43] The value of diversity in the educational context, or at least the

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[42] For purposes of this discussion, we still assume, as in Part I, that employers regard all graduates of elite universities as comparably qualified for positions in their workplaces, but we introduce the possibility that employers might consider characteristics other than objective qualifications in constructing their workforce.

[43] See *Fisher*, 133 S Ct at 2418 (stating that the "academic mission of a university is 'a special concern of the First Amendment'"), quoting *Bakke*, 438 US at 312.

value that has been assigned constitutional significance, encompasses a well known mélange of goods, including enhanced educational discourse, eradication of racial stereotypes and other types of de-biasing, reduction of racial isolation, preparation for citizenry in a pluralistic society, providing good modeling for minority youth, create a visible path for minorities leading to leadership roles in society, and so on.[44] Against the background of these interests, a law school might make special efforts to enroll students from racial minority groups who are most likely to bring an overtly "racial perspective" to classroom discussions, which might include minority students who have the least in common with most other students with respect to their backgrounds and experiences, in order to activate discourse benefits as envisioned in *Grutter* and *Regents of the University of California v Bakke*.[45]

Law firms might also have an interest in fostering diverse perspectives in the workplace on a different basis, such as the belief that this would improve its ability to anticipate client or customer needs. But, overriding concerns about workplace harmony might make employers wary of hiring individuals who will have trouble fitting into the corporate culture.[46] This does not mean that these institutions would seek individuals who dis-identify with their race or embrace a colorblind sense of self. Increasingly, corporate cultures are interested in establishing so-called "affinity groups," that is, groups that are organized around specific identities (such as, being gay or lesbian, a person of color, or a woman). While these groups are less prevalent in the law firm context, elite law firms are still interested in hiring people of color who will perform palatable or modest forms of racial diversity work. The point is that it will be the rare elite law firm that would hire an African American because that person will shake up the firm's institutional culture. This is precisely the kind of person an elite law school might admit.

More generally, the benefits that law schools as academic institutions might seek to advance will not necessarily readily

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[44] See Carbado, 60 UCLA L Rev at 1143–47 (cited in note 40) (analyzing discussions of the benefits of diversity in higher education in *Bakke* and *Grutter*).

[45] 438 US 265 (1977).

[46] Devon W. Carbado & Mitu Gulati, Book Review, *The Law and Economics of Critical Race Theory*, 112 Yale L J 1757, 1789–95 (2003) (surveying the literature on the extent to which corporate workplaces are often structured to achieve homogeneity).

map onto the priorities of a typical (non-academic) employer's workplace. To be clear: this is not to say that law firms will perceive no value in diversity. The point, instead, is that even when they perceive positive value in a diverse workforce they may have different reasons than law schools for doing so.

A final reason that law firm diversity screens might be different from law school diversity screens is that the employer may be hiring from a pool that has already been made diverse through affirmative action at an earlier screening stage (the admissions process). This fact may have varying implications. One possibility is that a law firm might make fine distinctions between minority individuals within the pool who may have been equal beneficiaries of pro-diversity admissions criteria. It might do so, for example, in order to screen out individuals whom it perceives would clash with its corporate culture.

Much of the foregoing is speculative. That should not obscure that our analysis is theoretically grounded in the fact that law firms and law schools operate under different incentive systems with respect to their pursuit of diversity. The difference in their incentive structures means that elite law firms may utilize different diversity-screening criteria than law schools.

III. THE DEMAND EFFECT

In Part II, we explored the implications of law firms and law schools employing different diversity screens. We assumed that these diversity-promoting criteria are stable over time and that they are independently fixed within each context. In this Part, we relax the latter assumptions to explore the possibility that universities might adjust their admissions policies in response to observed employment patterns, including employers' (here, the law firm's) revealed preferences about the kind of diversity they want.

At the outset, we should be clear to indicate that at least two factors could shape the extent of a law firm's interest in diversity: the law firm's substantive commitment to diversity and the law firm's symbolic commitment to diversity. With respect to the substantive commitment, a law firm might be committed to diversity because the firm's leadership thinks that pursuing diversity (a) is the right thing to do, (b) will improve workplace efficiency and productivity, and (c) provides access to markets. With respect to the symbolic commitment, a law firm

might simply want to signal diversity to avoid the reputational costs of not doing so. The question we explore now is how a law firm's interest in diversity can shape the kind of diversity a law school seeks to advance.

Our starting point is that elite law schools operate in a competitive market. While their primary mission may be educational and academic, they compete with each other to attract exceptional students who will enrich the community, perform to the highest academic standards, and make valuable contributions to society after they graduate. One way in which law schools attract students is by trying to outperform their peer institutions in placing their graduates in the most desirable jobs. If they are unable to compete with other law schools in achieving placement of graduates on the job market, the best students will decide to matriculate elsewhere. This will erode the affected universities' prestige and academic standing, eventually making it difficult for them to maintain their status among their elite peers. The fact that placement rates figure significantly in the overall ranking of law schools makes this dynamic all the more significant.[47]

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[47] Law school rankings tend to roughly match post-law school placement rates, and in recent years, with a soft legal job market in the wake of the 2008 Mortgage Meltdown, placement rates have become a weightier component of the key *U.S. News and World Report* ranking. See, for example, Elizabeth G. Olson, *And the U.S. News Law School Ranking Fallout Begins . . .*, (Fortune Mar 11, 2014), online at http://fortune.com/2014/03/11/and-the-u-s-news-law-school-ranking-fallout-begins/ (visited Oct 18, 2014); Jordan Weissmann, *The Jobs Crisis at Our Best Law Schools Is Much, Much Worse Than You Think* (Atlantic Monthly Apr 9, 2013), online at http://www.theatlantic.com/business/archive/2013/04/the-jobs-crisis-at-our-best-law-schools-is-much-much-worse-than-you-think/274795/ (visited Oct 18, 2014). The weak post-2008 legal job market has dramatically refocused public attention on law schools' placement rates for their graduates. 2011 and 2012 saw fifteen mostly lower-tier law schools sued by alumni for alleged fraud and misrepresentation regarding post-graduation placement rates, with threats of extending the rash of lawsuits to an ever-broadening spectrum of schools, though seemingly those threats never materialized. See, for example, Martha Neil, *12 More Law Schools Sued Over Reporting of Law Grad Employment and Salary Stats* (ABA J Feb 1, 2012), online at http://www.abajournal.com/news/article/12_more_law_schools_sued_in_consumer-fraud_class_action_re_reported_law/ (visited Oct 18, 2014); Sarah Mui, *Grads Sue New York Law School and Cooley Law, Saying They Inflated Job and Salary Stats* (ABA J Aug 10, 2011), online at http://www.abajournal.com/news/article/grads_sue_new_york_law_school_and_cooley_law_saying_they_inflated_job_and_s/ (visited Oct 18, 2014); Katherine Mangan, *Lawsuits Over Job-Placement Rates Threaten 20 More Law Schools* (Chronicle of Higher Ed Mar 14, 2012), online at http://chronicle.com/article/Lawsuits-Over-Job-Placement/131163/ (visited Oct 18, 2014). Scandals regarding misreporting of data to *U.S. News and World Report* led to resignations at other law schools, and legal scholars produced law review articles discussing theories of liability for legal actions against law schools and their administrators. See generally

The competition to place graduates in desirable jobs gives rise to an incentive for universities to admit more of the types of students who are sought by employers when they graduate, and fewer of the types of students who are not.[48] Law schools may have multiple reasons to admit or not admit a particular type of student. In general, to the extent that employers actively seek graduates who possess some discernible set of characteristics, universities will have an added incentive to look for those characteristics in the students they admit. If law firms tend not to hire graduates with some set of characteristics, then law schools will have less reason to admit applicants fitting that type.

There is no reason that this demand effect should not apply to characteristics associated with enhancing workplace diversity. If elite law firms give priority in their hiring to elite law school graduates who possess diversity-enhancing characteristics, law schools will have an added incentive to screen in favor of those characteristics at the admissions stage.[49] That is to say, other things equal,[50] law schools have an incentive to adopt admissions criteria that tend to produce

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Morgan Cloud and George Shepherd, *Law Deans in Jail*, 77 Mo L Rev 931 (2012); Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 Neb L Rev 866 (2013). The mood of crisis helped bring a new ABA accreditation standard requiring greater law school transparency regarding placement data. Mark Hansen, *ABA Committee Approves New Law School Disclosure Requirements* (ABA J Jan 17, 2012), online at http://www.abajournal.com/news/article/aba_committee_recommends_new_law_school_disclosure_requirements/ (visited on Oct 18, 2014). All of this recent commotion suggests that placement rates are likely very much on the minds of prospective law students as well as of law school administrators.

[48] Significantly, law schools are very much aware of where their students end up. For at least the past two decades, largely because of law school rankings, but also to facilitate alumni relationships and giving, law schools have been keeping fairly accurate records about where the graduates go. See, for example, *Recent Graduate Employment Data* (The University of Chicago Law School), online at http://www.law.uchicago.edu/prospective/employmentdata (visited Oct 18, 2014).

[49] And all the more so if, as seems reasonable to believe, affirmative action admittees carry a higher marginal cost than regular admittees (for example, higher recruitment, student support, and perhaps political costs). On the other hand, some or all of these added costs may be offset by the value of expected improvements to the quality of the educational experience resulting from a more diverse school is able to offer.

[50] We readily concede that other things may not be equal. For example, if LF-Diversity is insufficient to fully activate the educational benefits that might be possible with other modes of diversity, then universities might give priority to achievement of those educational benefits even at the cost of marginally lower employment of graduates. But our point is that employer demand for a particular type of diversity will exert a pull in that direction, not that the value of LF-Diversity will necessarily trump all other law school values.

LF-Diverse graduates. The demand exerted by employers for graduates meeting their diversity criteria could cause law firm diversity initiatives and law school diversity initiatives to converge over time.[51] Whether this occurs likely will depend on the strength of the law firm's diversity demand and the strength of the incentive for the law school to respond to this demand.[52]

IV. CONCLUSION: SOME IMPLICATIONS OF OUR MODEL

Our point of departure was the claim that law school and law firm diversity are intertwined. What happens in one setting impacts the other. We then moved on to show some of the specific ways in which the two contexts interact, including a discussion of how law firm diversity initiatives might modulate the flow of diversity from law schools to law firms, and how those initiatives might in turn loop back to influence the behavior of law school admissions committees. We conclude by suggesting several implications of our account for the development and promotion of workplace diversity.

First, the existence of diversity in the supply of labor that feeds into the employment market is a necessary condition of workplace diversity. Workplace diversity cannot be created from thin air. And insofar as law school student body diversity depends on educational affirmative action, it follows that educational affirmative action is a necessary condition of workplace diversity. In other words, in addition to constituting a law school's entering class, law school admissions constitute the future law firm application pool from which law firms hire.

Second, there is a quantitative and a qualitative dimension to this supply function. Quantitatively, the more aggressively pro-diversity the law school's admissions criteria, the more

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[51] We would not predict complete convergence because satisfying employer demand is only part of (and concededly, perhaps only a small part of) the educational benefit of a diverse student body. See discussion in Part I above.

[52] The strength of this incentive would turn on (a) how important employment rankings are to the overall ranking of the institution, (b) how much attention students pay to employment rates and/or rankings, and (c) whether jobs are scarce. As to the scarcity of jobs, we note that in conditions of full employment, the demand effect will be weak, unless employers actively avoid hiring students who are LS-Diverse—a possibility that is factored out by our initial assumptions of Part I. The demand effect will be most pronounced when law firms implement diversity initiatives in conditions of job scarcity. In those conditions, LF-Diverse students will be hired at a disproportionately higher rate than all other students, giving rise to an incentive for law schools to admit more students fitting that profile.

diverse the hiring pool. Qualitatively, the stronger the convergence between the kind of diversity in which a law firm is interested and the kind of diversity a law school seeks to advance, the greater the likelihood that the law firm will rely on the law school's construction of diversity rather than implementing its own screens, and thus the greater the likelihood that the law school's diversity will be reiterated into the law firm.

Third, by and large, we ought not worry about law schools engaging in "too much" affirmative action. Law firm behavior in this regard will be disciplined by the competitive markets in which they operate. But the same goes for the behavior of universities. Diversity initiatives in the educational context are, after all, voluntary. Universities have no reason to engage in affirmative action beyond a level that balances educational usefulness with whatever demand for diversity actually exists in the employment market.

Finally, we should query whether the story we tell about the demand effect means that law firms may be exerting too much pressure on law schools to conform their conception of diversity to the model that happens to prevail in the workplace. Law schools might have good reasons to offer admission to the iconoclastic, overtly racialized student with a penchant for challenging hierarchy and complacency with the status quo. Law firms might be more reticent in offering that student a job—and that might affect the law school's willingness to offer admission.

Similarly, law firms and law schools might have a very different sense of how much diversity is enough. "Critical mass"[53] from a law firm's perspective might look very different from "critical mass" from the perspective of the law school—and the former might end up shaping the latter. To put this another way, if law firms have a diversity saturation point or a diversity

[53] *Grutter*, 539 US at 340–41 (holding that a university admissions policy to generate a "critical mass" of diverse students does not violate the Equal Protection Clause).

ceiling, law schools have an incentive to adjust their affirmative action efforts to keep the diversity of their student bodies below that level. The concern, in short, is that the demand effect can influence both the quantitative and the qualitative supply of diversity throughout the loop. This suggests that we ought to begin a conversation about whether there are ways to effectuate a counterbalancing force so that a law school's quantitative and qualitative commitments to diversity are not only shaped by, but also shape how law firms articulate their vision of a diverse workplace.